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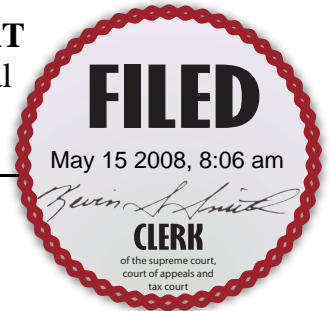
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**IN THE
COURT OF APPEALS OF INDIANA**

SILAS MITCHELL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0709-CR-547

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable John Barney, Judge

Cause No. 49G06-0705-FC-084280

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Silas Mitchell appeals his conviction for operating a motor vehicle after his privileges are forfeited for life, a Class C felony, claiming that the evidence is insufficient to support it. Concluding that sufficient evidence exists to support his conviction, we affirm the judgment of the trial court.

Facts and Procedural History

The facts most favorable to the verdict reveal that just after midnight on May 14, 2007, Mitchell and another man were sitting in a 1998 Cadillac parked near the curb close to the corner of 25th Street and Radar Street in Marion County, Indiana. Mitchell was seated in the driver's seat of the vehicle and the other man was seated in the passenger seat. While on patrol, Officer Michael Skeens from the Indianapolis Metropolitan Police Department noticed the Cadillac parked near the curb with the two men sitting inside of it. After driving past the Cadillac two separate times, Officer Skeens ran the license plate of the car through the Bureau of Motor Vehicles ("BMV"). The plate came back registered to a Pontiac. Officer Skeens "took mental note of [this] . . . because the vehicle was not appearing as if it was going to operate in the public street" Tr. p. 11. Thereafter, Officer Skeens drove by the Cadillac a third time, heard the engine of the car running, and noticed that the headlights and brake lights were on and that "the vehicle had began to move approximately . . . eight to ten inches from the curb as if [it] were going to enter the traffic lane." *Id.* Thereafter, Officer Skeens initiated a traffic stop and determined that Mitchell's "license was suspended as a habitual traffic violator for life." *Id.* at 13.

The State charged Mitchell with operating a motor vehicle after his privileges are forfeited for life, a Class C felony.¹ Mitchell waived his right to a jury trial. After a bench trial, the trial court found him guilty as charged. Thereafter, the trial court sentenced Mitchell to four years in the Indiana Department of Correction. Mitchell now appeals.

Discussion and Decision

Mitchell contends that the evidence is insufficient to support his conviction. “Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of the witnesses” *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. *Id.* We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

In order to find Mitchell guilty, the State had to prove that Mitchell was operating a motor vehicle after his driving privileges had been forfeited for life under Indiana Code section 16. Ind. Code § 9-30-10-17. Mitchell only challenges the operation element of the offense. Because there is no statutory definition of the verb “operate” used in Indiana Code § 9-30-10-17, we deduce its meaning from the definition of “operator.” *Hampton v. State*, 681 N.E.2d 250, 251 (Ind. Ct. App. 1997). According to Indiana Code § 9-13-2-118(a)(1), the “operator” of a motor vehicle is “a person . . . who . . . drives or is in actual

¹ Ind. Code § 9-30-10-17.

physical control of a motor vehicle upon a highway” Thus, to operate a vehicle is to drive it or be in actual physical control of it upon a highway. *Hampton*, 681 N.E.2d at 251. A public highway is a “street, an alley, a road, a highway, or a thoroughfare . . . that is used . . . or open to use by the public.” Ind. Code § 9-25-2-4.

Several factors may be examined to determine whether a defendant has “operated” a vehicle: (1) the location of the vehicle when it is discovered; (2) whether the car was in movement when discovered; (3) any additional evidence indicating that the defendant was observed operating the vehicle before he or she was discovered; and (4) the position of the automatic transmission. *Hampton*, 681 N.E.2d at 251. In addition to these four factors, “[a]ny evidence that leads to a reasonable inference should be considered.” *Id.*

While acknowledging “Indiana Courts have found that the act of putting a car in reverse and backing it out of a parking spot constitutes operation of a vehicle,” *see Parks v. State*, 752 N.E.2d 63, 66 (Ind. Ct. App. 2001), Mitchell maintains that “[t]his differs greatly from the eight (8) to ten (10) inch movement in [this] case.” Appellant’s Br. p. 8. In support of this contention, Mitchell claims that this case is analogous to *Nichols v. State*, 783 N.E.2d 1210 (Ind. Ct. App. 2003), in that insufficient evidence exists to show that Mitchell intentionally operated the vehicle. We disagree. In *Nichols*, the defendant was found asleep (and intoxicated) in a car that was parked in a parking lot with its engine running. Defendant’s conviction was reversed because there was insufficient evidence to support that he had “operated” the vehicle. As noted by the *Nichols* Court:

Although Nichols was asleep when Holland approached his car, he was awake when the car rolled backwards and when he applied the brake. The car’s motor was running, but only to keep Nichols warm in the cold weather. Nichols parked his car in the parking lot and intended to remain

there until his girlfriend picked him up. Finally, and most importantly, when Nichols applied the brake, he intended to stop the car from rolling and did not intend to operate the car.

Id. at 1212-1213.

This case is substantially different from *Nichols* and, therefore, distinguishable. Here, Officer Skeens heard the Cadillac's engine running, saw that the headlights and brake lights were on, and noticed that the car began to move away from the curb as if it was going to enter the traffic lane. Irrespective of the distance traveled, the evidence suggests that Mitchell was conscious, physically in control of the Cadillac, and intentionally operating it on a public street. Nonetheless, Mitchell maintains that he was not "operating" the car but rather was attempting "to diagnose a problem with the car." Appellant's App. p. 8. This evidence was presented to and ultimately rejected by the trial court. Thus, Mitchell's argument in this regard is merely a request that we reweigh the evidence, which we cannot do. The evidence is sufficient to support Mitchell's conviction for operating a motor vehicle while his privileges are forfeited for life.

Affirmed.

MAY, J., and MATHIAS, J., concur.